

LAW AND PUBLIC SAFETY

ATTORNEY GENERAL

Chemical Breath Testing

Proposed Readoption            N.J.A.C. 13:51

Authorized by:                Peter C. Harvey, Attorney General

Authority:                    N.J.S.A. 39:4-50.3, 39:3-10.25 and 12:7-56

Calendar Reference:            See Summary below for an explanation of  
the exception to the calendar  
requirement.

Proposal Number:            PRN 2004-

Interested persons may submit, in writing, data, views or  
arguments relevant to the proposal on or before 5:00 P.M.,  
Friday, June 4, 2004.

Submissions, and any inquiries about submissions or  
responses, by mail should be addressed to:

Vaughn L. McKoy, Director  
Division of Criminal Justice  
Prosecutors Supervision & Coordination Bureau  
Attention: Public Comments -  
Readoption Chemical Breath Testing Rules  
Richard J. Hughes Justice Complex  
P.O. Box 085  
Trenton, N.J. 08625-0085

Submissions, and any inquiries about submissions or responses, by hand delivery or other service should be addressed to:

Vaughn L. McKoy, Director  
Division of Criminal Justice  
Prosecutors Supervision & Coordination Bureau  
Attention: Public Comments -  
Readoption Chemical Breath Testing Rules  
Richard J. Hughes Justice Complex  
25 Market Street, Fifth Floor, West Wing  
Trenton, N.J. 08625-0085

No submissions via electronic mail will be accepted. All submissions must contain a return mailing address.

The Attorney General thereafter may readopt this proposal without further notice. The readoption will become effective upon filing with the Office of Administrative Law.

s/ \_\_\_\_\_  
Peter C. Harvey  
Attorney General

Date: 2/11/04 \_\_\_\_\_

The agency proposal follows:

### Summary

Pursuant to the provisions of N.J.S.A. 52:14B-5.1e, this chapter expires on August 17, 2004. The Attorney General of the State of New Jersey, as the person responsible for the proposal, adoption and promulgation of these rules, has reviewed these rules and found them to be necessary, reasonable and proper for the purpose for which they were originally promulgated.

Accordingly, the Attorney General proposes to readopt N.J.A.C. 13:51, the Chemical Breath Testing Rules, in its entirety, without amendments.

Amendments are not being proposed at this time, due to pending appellate litigation, discussed in more detail in this Summary. Following the conclusion of the appellate litigation, the Attorney General may propose amendments to these rules.

The present version of the Chemical Breath Testing Rules was readopted February 19, 1999, and became effective March 15, 1999, as R. 1999, d. 87. 31 N.J.R. 770(b). The rules were amended, effective November 19, 2001. 33 N.J.R. 3902(b).

The rules are organized in four subchapters.

Subchapter 1, Breath Test Operators, N.J.A.C. 13:51-1, is described below.

N.J.A.C. 13:51-1.1 sets forth the purpose of the rules, pursuant to the various authorizing statutory authorities.

N.J.A.C. 13:51-1.2 contains the definitions for the terms employed throughout the entire body of the Chemical Breath Testing regulatory scheme.

N.J.A.C. 13:51-1.3, Certification, discusses that, for the purposes of prosecution, certification of a person as a Breath Test Operator is required. This section also discusses the certification requirements, that certification is granted in the form of a certificate and a replica certificate, and that certification is a training certification only.

N.J.A.C. 13:51-1.4 describes the prerequisite requirements for a law enforcement officer to become certified as a Breath Test Operator.

N.J.A.C. 13:51-1.5 is the process by which application to become a Breath Test Operator is accomplished.

N.J.A.C. 13:51-1.6 sets forth the certification training requirements necessary to become a Breath Test Operator, and the training requirements to maintain that status, as well as training requirement to be trained on new chemical breath testing methods and technologies.

N.J.A.C. 13:51-1.7 sets out the validation of a certification and the duration of a certification. The certification of all law enforcement officers who have been

certified as a Breath Test Operator is for the remainder of the calendar year in which the certification is issued and for the next two calendar years.

N.J.A.C. 13:51-1.8 sets forth the requirements for the reinstatement of a certification of a Breath Test Operator, whose certification has lapsed or expired.

N.J.A.C. 13:51-1.9 sets out the process by which the Attorney General can revoke the certification status of a Breath Test Operator.

N.J.A.C. 13:51-1.10 sets forth the process by which a revocation hearing is held, if requested.

N.J.A.C. 13:51-1.11 permits the Attorney General to restore a revoked certification once the Attorney General is satisfied that the cause for revocation has been removed.

N.J.A.C. 13:51-1.12 sets out the process to be followed if the certification of a Breath Test Operator is revoked or suspended. This section also provides a mechanism for the replacement of lost certification or replica documents. N.J.A.C. 13:51-1.12(c).

With regard to this latter subsection, the Superior Court, Appellate Division, in State v. Sohl, 363 N.J. Super. 573 (App. Div. 2003) reversed the finding of the Law Division Judge and determined that the absence of the initial course completion date on the reverse side of a replacement replica certificate did not

render the certification or the replica certificate of the Breath Test Operator invalid. State v. Sohl, 363 N.J. Super. at 577-580. This view expressed by the Appellate Division corresponds to the view held by the Attorney General when this subsection was amended in 1999. See notice of proposed readoption with amendments, 30 N.J.R. 4321(a), Summary 30 N.J.R. at 4324, December 21, 1998.

N.J.A.C. 13:51-1.14 establishes that it is the Attorney General who makes any determination as to the status of a Breath Test Operator, based upon the records maintained by the Division of State Police. Moreover, such a determination, by the Attorney General, is deemed to be prima facie evidence of the status of a Breath Test Operator.

Subchapter 2, Breath Test Coordinator/Instructors, N.J.A.C. 13:51-2, is described below.

N.J.A.C. 13:51-2.1 sets forth the eligibility requirements for a member of the New Jersey Division of State Police to become a Breath Test Coordinator/Instructor. It also specifies the manner in which the Attorney General approves such an appointment.

N.J.A.C. 13:51-2.2 sets forth the training and functional qualifications for a member of the New Jersey Division of State Police to become a Breath Test Coordinator/Instructor.

Subchapter 3, Approved Chemical Breath Testing Methods,

Instruments and Methods of Operation, N.J.A.C. 13:51-3, is described below.

N.J.A.C. 13:51-3.1 sets forth the purpose of this subchapter, consistent with the various statutory authorities.

N.J.A.C. 13:51-3.2 describes the mechanism by which a method of chemical breath testing and an instrument employing that method of chemical breath testing is approved by the Attorney General.

N.J.A.C. 13:51-3.3 is the mechanism by which the Breath Test Coordinator/Instructors are trained, by the manufacturer, on a new method of chemical breath testing and an instrument employing that method of chemical breath testing once the method and instrument have been approved by the Attorney General.

N.J.A.C. 13:51-3.5 contains the methods of chemical breath testing approved by the Attorney General, pursuant to the authorizing statutes. Those methods include Photometry and Infrared analysis and electrochemical analysis, when utilized in a single approved instrument as a dual system of chemical breath testing. Approved instruments, employing these approved methods of chemical breath testing are: Photometry, the utilizing the Breathalyzer® Model 900 or Model 900A, or the Dominator Albreath; and Infrared analysis and electrochemical analysis, utilizing the Alcotest® 7110 MK III.

At N.J.A.C. 13:51-3.5(a)2i the Attorney General approved the



Alcotest® 7110 MK III as an "approved instrument" for chemical breath testing. That approved instrument also is available with a communications feature, and an instrument with that option is called an Alcotest® 7110 MK III-C. However, and as referenced in the Summary of notice of proposed readoption, published December 21, 1998, the "C" designation and communications feature option is not integral to the functioning of the Alcotest® 7110 MK III or Alcotest® 7110 MK III-C as an approved evidential breath test instrument. See 30 N.J.R. 4321, 4325, referencing the "Conforming Products List (CPL) of Evidential Breath Test Devices (EBTDs)," as published by the National Highway Traffic Safety Administration (NHTSA), at 63 Fed. Reg. 10066, Feb. 27, 1998. In that CPL amendment, NHTSA made the following statement.

"The Alcotest 7110 MK III, manufactured by National Draeger, Inc., is now also made with an internal computer communications feature as a standard capability of the instrument. The enhanced version of the device with the new computer communications capability will be sold as the Alcotest 7110 MK III-C. This new designation is added to the CPL, though NHTSA made the judgment that additional testing of the enhanced device was not necessary **because the enhancements have no**

**bearing on the alcohol measuring capability  
of the device."** [Emphasis added.]

N.J.A.C. 13:51-3.6 describes the approved methods of operation for the performance of chemical breath testing of the breath of a person using approved instruments.

Subchapter 4, Breath Test Instrument, General Maintenance and Administrative Recordkeeping, N.J.A.C. 13:51-4, is described below.

N.J.A.C. 13:51-4.1 sets forth the purpose of this subchapter.

N.J.A.C. 13:51-4.2 addresses the maintenance of administrative files by the Division of State Police for the Attorney General. It also provides a mechanism for public access to documents which fall within the scope of public records.

N.J.A.C. 13:51-4.3 addresses the function of periodic inspection of breath test instruments, by Breath Test Coordinator /Instructors for photometric and infrared/electrochemical analysis breath test instruments.

With respect to this section, it is noted that following the decision by the New Jersey Supreme Court in State v. Garthe, 145 N.J. 1 (1996), with respect to the manner in which periodic inspections are performed, the Superior Court Appellate Division made a similar finding in State v. Cleverley, 348 N.J. Super. 455 (App. Div. 2002). In State v. Cleverley, the Appellate Division

was asked to determine "whether a revision in the standard protocols for use by State Police coordinators in testing breathalyzers affects the admissibility in evidence in driving while intoxicated (DWI) prosecutions of the Breath Test Inspectors' Inspection Certification (BTIIC) to establish that the [B]reathalyzer was in proper working order." State v. Cleverley, 348 N.J. Super. at 457. The Court, following the reasoning and rationale in State v. Garthe, supra, found that the October 1, 1997 revision of the inspection procedures, prepared by the Chief Forensic Scientist of the Division of State Police, was acceptable and proper. State v. Cleverley, 348 N.J. Super. at 457, 464-5.

The Appendix to the rules is the "Alcohol Influence Report Form, Breathalyzer Check List." This Form is used to record the results of chemical breath tests performed on photometric chemical breath test instruments. N.J.A.C. 13:51-3.5(a)1, pursuant to N.J.A.C. 13:51-3.6(a).

As this notice indicates, these rules are being proposed for readoption without amendments. That decision stems in part from the fact that there is litigation presently pending with respect to the Alcotest® 7110 MK III evidential breath test instrument.

Beginning in late 2000, a one year pilot project was initiated in Pennsauken Township, Camden County, to introduce the Alcotest® 7110 MK III evidential breath test instrument. During

the pilot project over 350 individuals were subjected to chemical breath testing on an Alcotest® 7110 MK III evidential breath test instrument in the Pennsauken Township Police Department. Of that group, in early 2002, twenty (20) of those defendants were joined in a pre-trial consolidated motion in the Superior Court, Law Division. The purpose of the consolidated motion was to conduct a pre-trial N.J.R.E. §104 Motion, where the State would present evidence, through appropriate expert witnesses, sufficient for the Law Division Court to determine that chemical breath test results obtained on the Alcotest® 7110 MKIII evidential breath test instrument are scientifically accurate and reliable, and therefore, can be introduced in evidence in a prosecution for a violation of N.J.S.A. 39:4-50 (DWI), N.J.S.A. 39:3-10.13 (CDL/DWI) or N.J.S.A. 12:7-46 (Operating a Vessel While Intoxicated), without the need for the State to produce expert witnesses in each and every case.

The Court granted the State's motion for a pre-trial N.J.R.E. §104 hearing; the case is identified as State v. Arnold Foley, et al., Superior Court Law Division, Camden County, Docket No. A 45-02.

The evidentiary hearing commenced on September 8, 2003 and concluded on October 14, 2003. The State presented evidence from expert witnesses on the scientific reliability and accuracy of the chemical breath testing readings obtained from the Alcotest®

7110 MK III evidential breath test instrument. The defense presented their arguments, through an expert witness, asserting the contrary view.

Following that pre-trial evidentiary hearing, the Judge made findings of fact and conclusions of law and issued a written opinion on December 12, 2003. State v. Arnold Foley, et al., Docket No. A 45-02 (Law Division, December 12, 2003). In that written opinion, the Court found

" . . . that the [Alcotest®] 7110 [MK III], which uses both infrared analysis and electrochemical analysis as a dual system of chemical breath testing, is scientifically reliable and accurate. Therefore, chemical breath test readings produced by the [Alcotest®] 7110 [MK III] may be introduced in evidence in a prosecution for violation of N.J.S.A. 39:4-50, or N.J.S.A. 39:3-10.13, or N.J.S.A. 12:7-46 without the need for the State to produce expert witnesses in each and every case."

State v. Foley, Written Opinion at page 1. Also, page 21.

However, in the course of making its findings of fact, the Law Division Judge made certain findings, which in the view of

the Attorney General, went beyond the scope of the pre-trial N.J.R.E. §104 hearing.

As a result of these additional findings of fact, it is anticipated that there will be additional litigation at the trial or appellate level. Accordingly, amendments to these rules are not being proposed at this time. Amendments may be proposed once litigation on this issue is concluded.

#### Social Impact

These rules will continue to have an obvious beneficial social impact. The apprehension, prosecution and conviction of individuals operating vehicles or vessels while under the influence of intoxicating liquor or drugs, or with an alcohol concentration in their blood or breath at, or above, a specific legislatively determined level, serve the overall public good.

These rules most directly affect police and other law enforcement officers, police departments and law enforcement agencies and the heads of those agencies, including the State Police. They serve to assist police and law enforcement in the efficient administration of the implied consent provisions requiring chemical breath testing of a person suspected of operating a motor vehicle or vessel while intoxicated.

### Economic Impact

The proposed readoption of the Chemical Breath Testing Rules will have no economic impact upon the general public or upon the government entities directly affected by its provisions. The entity which is expected to initially bear the primary costs associated with these changes is the Division of State Police through the additional acquisition of these new evidential chemical breath test instruments and establishment of related training and administrative procedures. The Attorney General, through the Division of Criminal Justice, and various County Prosecutor's Offices are also expected to be affected through their respective involvement in legal challenges not addressed in State v. Foley, supra.

Other law enforcement entities and prosecutors (municipal and county) may be affected. However, any decision to purchase new chemical breath testing instruments is an elective decision, since there is no requirement in these rules that existing chemical breath testing methods or instruments be abandoned. A decision to acquire any new chemical breath testing technology is a decision made at the discretion of the Chief of Police or other law enforcement executive, subject to approval and appropriation of funds by the appropriate authorities of the local governing unit. However, it is anticipated that many law enforcement

entities may elect to utilize funds being held in their Drunk Driving Enforcement Fund account (N.J.S.A. 39:4-50.8), or seek grants to purchase new chemical breath testing instruments.

Any economic impact on manufacturers or vendors of chemical breath testing instruments, under the provisions at Section 3.2, are costs associated with the marketing and testing of those instruments. Any materials which these rules may require manufacturers or vendors to produce, are materials and documentation which those entities should already have readily available to them as part of any proposal to the State.

#### Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption were not issued:

1) under the authority of any Federal law or State statute that incorporates or refers to Federal law, Federal standards or Federal requirements; or

2) to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, Federal standards or Federal requirements.



### Jobs Impact

The Attorney General anticipates that the rules proposed for readoption will not result in the creation of new jobs or cause the loss of existing jobs.

### Agriculture Industry Impact

The rules proposed for readoption will not have any impact on the agriculture industry in New Jersey or elsewhere.

### Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the rules proposed for readoption do not impose reporting, record keeping or other compliance requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules do not impact small businesses. Manufacturers or vendors of evidential chemical breath test instruments and related supplies and equipment are not small businesses within the meaning of the Regulatory Flexibility Act.

The Attorney General finds that a regulatory flexibility analysis is not required under the provisions of Section 4, Chapter 169 of the Public Laws of 1986. The Chemical Breath

Testing Rules do not impose reporting, record keeping or other compliance requirements on small businesses. The rules only impose duties and responsibilities upon the Attorney General, law enforcement agencies and the Division of State Police pursuant to N.J.S.A. 39:4-50.3, N.J.S.A. 39:3-10.25 and N.J.S.A. 12:7-56.

#### Smart Growth Impact

The rules proposed for readoption will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:51.